

FEDERAL CIRCUIT COURT OF AUSTRALIA

*AWC18 v MINISTER FOR HOME AFFAIRS &
ANOR*

[2018] FCCA 3046

Catchwords:

MIGRATION –Categories of visas – Protection, refugee and humanitarian visas – Other types of refugee, humanitarian and protection visas – Safe Haven Enterprise visas.

MIGRATION – Review of decisions – Protection visa decisions – Fast track review process – Conduct of review – Additional information – new information – where new information not relevant to dispositive issue.

Legislation:

Migration Act 1958 (Cth), ss.5(1), 65, 91WA(1), 473DD, 473 DD(a), 473DD(b)(i), 473DD(b)(ii), 487ZI(2), Part 7AA

Cases cited:

CSR16 v Minister for Immigration and Border Protection [2018] FCA 474
Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 92 ALJR 481

Applicant:	AWC18
First Respondent:	MINISTER FOR HOME AFFAIRS
Second Respondent:	IMMIGRATION ASSESSMENT AUTHORITY
File Number:	BRG 183 of 2018
Judgment of:	Judge Jarrett
Hearing date:	5 October 2018
Date of Last Submission:	5 October 2018
Delivered at:	Brisbane
Delivered on:	26 October 2018

REPRESENTATION

Counsel for the Applicant: Mr Burrows

Solicitors for the Applicant: Arc Migration

Solicitors for the First
Respondent: Minter Ellison

The Second Respondent: entered a submitting appearance

ORDERS

- (1) The application for review filed on 22 February 2018 be dismissed.
- (2) The applicant pay the first respondent's costs of and incidental to the application fixed in the sum of \$5,500.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 183 of 2018

AWC18

Applicant

And

MINISTER FOR HOME AFFAIRS

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

REASONS FOR JUDGMENT

1. The applicant seeks judicial review of a decision of the second respondent given on 30 January, 2018. That decision affirmed a decision of a delegate of the first respondent to refuse the applicant a Safe Haven Enterprise Visa.
2. As identified by the applicant's counsel, the only issue in this case is a procedural issue with respect to whether the second respondent correctly applied s.473DD of the *Migration Act 1958* when making its decision. The first respondent contends that there is no error attending the second respondent's decision and the application must be dismissed.

3. For the reasons that follow, I have concluded that the second respondent's decision is unaffected by jurisdictional error and the application must be dismissed.

Background

4. The applicant is a citizen of Afghanistan who arrived in Australia as an *unlawful maritime arrival* on 28 November, 2012. His visa application is subject to Part 7AA of the Migration Act.
5. The applicant made his application for a Safe Haven Enterprise Visa on 24 November, 2016. He claimed to fear harm in Afghanistan because in 1998 his uncle who was the chief of the village in which he lived was killed by the Taliban. In 2008 his father went missing while travelling to Iran and it is believed his father was captured and killed by the Taliban because when his uncle was killed the Taliban promised to persecute the whole family, including the applicant's family. The applicant claimed that his family owned property and land and the Kuchis would come and graze their cattle on the land in the mountains every year. He says that he was beaten on his way to school by the Taliban and by other people in his village and several of his older friends were killed by the Taliban.
6. The applicant further claimed that after the death of his uncle and the suspected abduction of his father he lived in fear. He says that he was unable to seek assistance from the police or other local authorities because they were known to be corrupt and powerless against the Taliban who had infiltrated their ranks.
7. In 2012 the applicant says that he moved to Kabul but it was not safe for him there either because of his ethnicity as a Hazara and his family's history with the Taliban.
8. The applicant feared that on return he will be harmed by the Taliban because of his and his family's past history involving the Taliban and he will be harmed by the Taliban, ISIS and other anti-government elements because of his Hazara ethnicity, Shia Muslim religion, his anti-Taliban pro-government political opinion arising from his ethnicity and religion and his return from a western country. He also feared that

as a returnee from a western country he would be considered an infidel and harmed because of that.

9. The applicant attended an interview for the purposes of his visa application on 22 December, 2016. He was represented at that interview and his representative sought and was granted additional time to provide some written submissions with respect to the visa application. Those submissions were provided on 13 January, 2017. The submissions enclose certain documents that had been requested of the applicant at the interview. In particular the submissions included what purported to be the applicant's original Afghan driver's license and an original educational certificate. However, on 17 January, 2017 the first respondent's department issued the applicant with a notice of seizure of his Afghan driver's license because the first respondent's delegate assessed that the document was reasonably suspected to be a *bogus document* as defined by s.5(1) of the Migration Act. The document was deemed to be forfeited to the Commonwealth pursuant to s.487ZI(2) of the Act.
10. The applicant was informed that his visa application was required to be refused unless he had a reasonable explanation for producing the *bogus document*. He was invited to provide such an explanation. The applicant, by his representative, responded to that invitation.
11. On 8 May, 2017 a delegate of the first respondent refused the applicant's visa application because the delegate was satisfied that the driver's license that the applicant had submitted was a *bogus document* for the purposes of the Act. Although the delegate had considered the applicant's explanation for the provision of the document, the delegate made no finding about that explanation but rather determined the visa application by reference to the applicant's substantive factual claims. The delegate found that the applicant did not satisfy the criteria for the grant of the visa after assessment of the substantive merits of his application.
12. As is required by Part 7AA of the Act, the delegate's decision was referred for review by the second respondent. The applicant's representative provided the second respondent with a submission for the purposes of that review on 1 June, 2017. I will return to those submissions and the material enclosed with them later in these reasons.

13. On 30 January, 2018 the second respondent affirmed the delegate's decision to refuse the applicant's visa application. The second respondent identified the issue before it as whether the grant of the visa was prevented by s.91WA(1) of the Migration Act. That section provides:

91WA Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

14. The second respondent considered whether the applicant provided the Afghan driver's license as evidence of his identity, nationality or citizenship for the purposes of his visa application. The second respondent, at length, considered the correspondence passing between the first respondent's department and the applicant, requesting the

applicant to attend an interview and pointing out to him that he was to bring all original identity documents he held to the interview and that if he gave false or misleading information, the application may be refused. Further, the second respondent recorded the exchanges between the applicant and his representative and the first respondent's delegate at the visa application interview on 22 December, 2016. It was not suggested in argument before me that the second respondent's recitation of any of those factual matters leading to the provision by the applicant to the first respondent of his original Afghan driver's license was inaccurate. The second respondent concluded:

28. Having regard to all the evidence before me, including the Department's notifications to the applicant that he was provide any identity documents he had at the protection visa interview, the applicant's own actions in voluntarily advising that he had in his possession an Afghan driver's licence, the representative's contentions that given the significant (sic) of the document to his identity the applicant had it sent to him and as the Afghan driver's licence is on its face an identity document, I am satisfied the Afghan driver's licence has been provided by the applicant to the Minister as evidence of his identity, nationality and citizenship.

15. The second respondent then went on to consider whether the applicant's Afghan driver's license was a *bogus document* for the purposes of the Act. The second respondent concluded that the applicant's Afghan driver's license was a *bogus document*:

33. Having regard to all the evidence, including the inconsistencies in the details and format, the applicant's own evidence that the Afghan driver's licence was obtained through a people smuggler and the information reporting of the prevalence of fraudulent Afghan driver's licences in Australia, I am satisfied that the Afghan driver's licence is a bogus document as defined by s.5(1)(b) of the Act.

16. The second respondent then considered whether the applicant had a reasonable explanation for producing the *bogus document*. The second respondent considered the applicant's evidence that he had given at the visa application interview about his Afghan driver's license and whether it was a genuine document. It is not suggested that the second respondent has inaccurately interpreted what occurred at the visa application interview. The second respondent also considered the post

interview submission made by the applicant's first representative about the Afghan driver's license and the further submissions made by the applicant's second representative. The second respondent rejected the truth of the applicant's claims that he had unintentionally provided a *bogus document*. The second respondent was not satisfied that the applicant had provided a reasonable explanation as to why he had provided a *bogus document* in the form of his Afghan driver's license to the first respondent as evidence of his identity. The second respondent concluded:

46. Having regard to all the evidence, including the applicant's explanations, the representative's submissions and the country information, I am not satisfied the applicant has a reasonable explanation for producing a bogus document as evidence of his identity, nationality or citizenship. I am not satisfied s.91WA(2)(a) of the Act has been met.

47. I am satisfied that s.91WA of the Act applies to the applicant. Therefore, the grant of the protection visa is prevented by that section and under s.65 of the Act it must be refused.

48. As such, I have found it unnecessary to consider whether the applicant satisfies the criteria in s.36(2) for a protection visa.

Grounds of Review

17. The applicant's grounds of review are two-fold. By the first ground he asserts that the second respondent failed to take into account relevant considerations, including country information and erred in rejecting its acceptance. The application contains no particulars as to the relevant considerations said not to have been taken into account by the second respondent, the particular country information said not to have been taken into account by the second respondent nor any particulars as to the way in which it is said that the second respondent erred in rejecting "its acceptance". The second ground asserts that the second respondent was unreasonable in that the second respondent erred in assessing the risk of return to Afghanistan.
18. By his written submissions counsel for the applicant expressly abandoned the second ground of the application for review.

19. The applicant's argument focuses upon the submissions made by his representative to the second respondent for the purposes of the second respondent's review. That submission, together with copies of country information reports referred to in the submission, were sent by the applicant's representative to the second respondent on 1 June, 2017. The second respondent recorded that the submission contained discussion on why the applicant did not agree with the delegate's decision and to that extent, the second respondent considered those matters as argument rather than *new information* for the purposes of s.473DD of the Act. The second respondent noted that the submission did not address, nor did it make mention of the delegate's findings regarding the *bogus document* which the delegate had found had been provided in support of the applicant's identity, nationality or citizenship.
20. In support of the applicant's claims and his arguments as to why he did not agree with the delegate's decision, the submission referred to certain country information particularised by the second respondent in paragraph 7 of its reasons. The second respondent recorded that the information was not before the delegate and that it was *new information*. It recorded that the sources were general country information and that the information all predated the delegate's decision. The second respondent recorded that the applicant was represented at the protection visa interview and that a post interview submission had also been provided. The second respondent recorded that there was no explanation provided as to why the material set out in paragraph 7 of its reasons was not provided to the delegate prior to the decision being made. Whilst the second respondent acknowledged that the information had been received from the applicant's current representative who was appointed after the protection interview, the second respondent also noted that that representative made a submission prior to the delegate making the visa decision and nonetheless, that information was not provided.
21. The second respondent was not satisfied that the information recorded in paragraph 7 of its reasons could not have been provided to the first respondent before the first respondent's delegate made his decision. Nor was the second respondent satisfied that it was *credible personal information* which was not previously known and had it been known

may have affected the consideration of the applicant's claims. The second respondent therefore did not consider it. In paragraph 8 of its reasons for decision, the second respondent then says:

Furthermore, on the approach I have taken, the new information is irrelevant. Having regard to all the circumstances, I am also not satisfied there are exceptional circumstances to justify the consideration of this new information.

22. In paragraph 9 of its reasons the second respondent sets out further items of country information provided by the applicant's representative in their submission. The second respondent recorded that the information was not before the first respondent's delegate and that it was *new information*. It recorded that the sources were general country information and that they were published a day prior to or post-dated the primary visa decision. The second respondent was satisfied that the information could not have been provided to the delegate prior to the delegate's decision being made but, nonetheless, found it unnecessary to consider the information. It is necessary to set out paragraph 10 of the second respondent's decision out in full:

10. The information was not before the delegate. It is new information. The sources are general country information; it is not credible personal information. The sources (m)-(r) were published a day prior to or post-date the delegate's decision. The representative has contended that the sources (m)-(r) should be considered as the information has "direct relevant to the threat of harm and reasonableness of relocation [of the applicant] to Kabul". I am satisfied that the information could not be provided to the delegate prior to the decision being made; however, I have found it unnecessary to consider the question of relocation to Kabul. On the approach I have taken, the new information concerning the threat of harm and reasonableness of relocation to Kabul is irrelevant. Having regard to all the circumstances, I am not satisfied there are exceptional circumstances to justify the consideration of this new information.

23. The applicant argues that the statements in paragraph 8 and paragraph 10 of the second respondent's decision to the effect that "On the approach I have taken, the new information... is irrelevant" indicates that the second respondent had determined the case before deciding whether to consider the *new information* pursuant to s.473DD of the Act. He argues that the question that the second respondent has asked

itself is whether there was an exceptional circumstance to “exclude” the information because, having already decided to refuse the application, it should not consider the information. He argues that it is “entirely inappropriate... for the IAA to approach the task of determining any application prior to considering what information it is appropriate to determine the application upon”. In this respect, the applicant points to *CSR16 v Minister for Immigration and Border Protection* [2018] FCA 474 where, at [41] Bromberg J said:

[41] In my view all that the “credible” element of the s 473DD(b) (ii) criteria requires is the Authority’s satisfaction that the “new information” is information which is open to be or capable of being accepted by the Authority as truthful (or accurate, or genuine). It is only at the deliberative stage of its review that the Authority will be required to determine whether or not the “new information” is true. The s 473DD(b)(ii) criteria is concerned with an earlier or anterior stage of the review directed at whether “new information” should be received by the Authority so that it may be considered at the deliberative stage.

24. The first respondent argues that the second respondent did not err in its application of s.473DD of the Act. The first respondent argues, and I accept, that the second respondent considered the substance of the requirements of ss.473DD(b)(i) and (ii) of the Act in respect of both groups of information identified by the second respondent in its reasons. In respect of the material in paragraph 7 of its reasons, it identified that neither of those alternative requirements were satisfied and so there could have been no reception of that material. The second respondent’s reasons make it clear that it gave consideration to the content of the material for the purposes of making the determinations required by s.473DD(b)(i) and (ii). There is no challenge to that determination. The second respondent also considered the cumulative requirement in s.473DD(a) of the Act and found that there were no exceptional circumstances to justify considering that *new information*.
25. As to the material particularised in paragraph 9 of the second respondent’s decision, the second respondent took the same approach. It found that s.473DD(b)(i) was satisfied. However it did not consider that there were exceptional circumstances to receive the material. A fair reading of paragraph 10 of the second respondent’s reasons reveals primarily that was because it was not relevant to the issue that the

second respondent considered was dispositive. The requirement that the *new information* under consideration be relevant (as considered by the Authority) is not in doubt. In *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 the plurality said (footnotes omitted):

24. *The term “new information” must be read consistently when used in ss 473DC, 473DD and 473DE as limited to “information” (which may or may not be recorded in a document), in the ordinary sense of a communication of knowledge about some particular fact, subject or event, that meets the two conditions set out in s 473DC(1)(a) and (b). The first is that the information was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa. The second is that the Authority considers that the information may be relevant.*

26. In my view, there was no error in the second respondent’s approach. The issue identified by the second respondent and recorded at paragraph 12 of its reasons concerned the operation of s.91WA of the Act and whether the second respondent was required to refuse the applicant’s visa application. For the reasons discussed above the second respondent concluded that the applicant’s visa application was required to be refused and that s.91WA(1) of the Act was engaged. Given that none of the *new information* bore on the issue of the bogus document or why the applicant had supplied it to the department no occasion arose to consider that material against the factual merits of the applicant’s claims for protection or complementary protection. *CSR16* (above) is of no assistance to the applicant.
27. In those circumstances the second respondent’s statements set out in paragraphs 8 and 10 of its reasons to the effect that the new information referred to in those paragraphs was irrelevant given the approach to be taken by the second respondent was entirely open to it. Further, the potential relevance of the new information to the review being conducted by the second respondent was a matter which was plainly to be considered when the second respondent was considering whether there were *exceptional circumstances* for the purposes of s.473DD(a). It would seem a curious result that the second respondent should be required to decide whether to receive and then, if so

received, consider material that was on its face irrelevant to the dispositive issues in the case.

Conclusion

28. The ground of review pressed by the applicant reveals no jurisdictional error on the part of the second respondent. The application for review must be dismissed with costs.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Jarrett.

Date: 26 October 2018